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Nancy A. Welsh

Texas A&M University School of Law, nwelsh@law.tamu.edu

Ann Montgomery

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GRAPPLING THE MONSTER CASE:

THE NEXT FRONTIER IN ADR

BY NANCY WELSH AND
JUDGE ANN MONTGOMERY

Not so long ago, "ADR" was just one more term in a legal jargon already filled with too many acronyms. While we concede that "ADR" might not rival "CPR" as a vital necessity, its use is extremely important to the practice of law today. Since the promulgation of Rule 114 of the Minnesota General Rules of Practice, nearly 80 percent of Minnesota attorneys report that they are using ADR to help resolve their civil cases filed in state trial courts.¹ Their reasons? ADR processes can cut litigation costs, reduce clients' expenses, save attorneys' and clients' time, and generate earlier settlements. National research also consistently shows that ADR increases clients' satisfaction with the resolution of their cases.

But most attorneys think of ADR only in relatively standard, two-party cases. It probably would surprise many attorneys that ADR also is being used to help settle huge, complicated class actions or mass torts. One dramatic — and instructive — example of this use of ADR has occurred in the federal court in Minnesota.² In this article, we will describe this use of ADR — and share a few of the lessons learned in this experience.

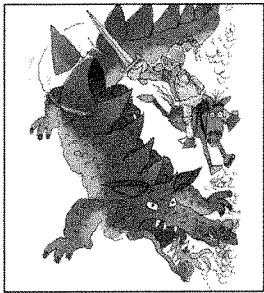
In 1992, Northwest Airlines and class counsel in *Aburime et al. v. Northwest Airlines, et al.*, 3-89 CIV 402, reached a settlement which included an innovative ADR process to deal with the individual, fact-specific claims of class members. *Aburime* was a federal class action in which the plaintiff class alleged racial discrimination in the hiring, promotion and termination decisions of Northwest Airlines. More than 1,000 individuals were in the class. Judge Donald Alsop approved a Consent Decree which the parties negotiated as part of an overall settlement. The Consent Decree included an expedited arbitration process which provided for limited discovery, limitations on the length of the arbitration hearings, and instructions for the arbitrators regarding the calculation of damages.

The parties contracted with Mediation Center, a respected and experienced nonprofit ADR organization, to administer the ADR provisions in the Consent Decree. First, Mediation Center worked closely with the attorneys to develop a panel of six attorneys and retired judges to serve as arbitrators (called "hearing examiners" in the Consent Decree). All of the hearing examiners were experienced in employment law and mutually acceptable to the parties.³ Second, in a two-day en banc hearing, the parties presented statistical evidence to the hearing examiners. (The hearing examiners did not issue any joint findings of fact or conclusions of law based on the statistical hearing. Rather, each hearing examiner used the information from the hearing to assist him or her in making decisions regarding particular claims.) Third, the attorneys met with Mediation Center's executive director, who also directed this project, to reach agreements regarding the submission of claims (referred to as "tolling" in the Consent Decree) and other procedural issues.

Submission of claims then began. Hearing examiners were assigned on a rotating basis to handle each class member and his or her claim(s). The hearing examiners' responsibilities included: resolution of discovery disputes, resolution of eligibility objections, and rulings regarding liability and damages. The Consent Decree also gave Northwest Airlines the option to offer job relief to individuals who claimed discrimination in hiring decisions. The hearing examiners were responsible for reviewing and approving or disapproving any settlements based on offers of job relief, focusing particularly on the terms regarding retroactive seniority and the particular positions being offered. The hearing examiners also reviewed any objections raised by the affected unions regarding these settlements. Finally, meeting en banc, the hearing examiners made determinations regarding general procedural issues, after receiving written submissions (usually brief letters) from the parties.



ADR holds great promise for resolving numerous demanding claims in "monster" litigation, but attorneys and judges need to use this tool thoughtfully.



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The parties began submitting claims to the ADR process in late 1992. The last claims were resolved in mid-1996. During the course of this project, Mediation Center, the attorneys, and the court learned many lessons about using ADR in monster litigated matters. We hope these may prove useful to other attorneys, judges, and clients who are trying to settle large cases in innovative ways.

DECIDING PROCEDURAL ISSUES

Clear and comprehensive procedures are critical to the success of a large-scale ADR process — and both clarity and comprehensiveness can be elusive in the initial creation of an ADR process. The Consent Decree in *Aburime* was voluminous; the attorneys were very conscientious in trying to identify key procedural issues and drafting provisions to respond to them. Nonetheless, and perhaps inevitably, some issues were not covered — or even anticipated — when the parties created the ADR process in *Aburime*. For example, the Consent Decree assumed that the parties would be able to reach agreement on the rate at which claims would be processed. The parties did not always agree. Ultimately, after receiving some written encouragement from Judge Alsop, the hearing examiners stepped in, and decided this procedural issue as well as many others that arose.

Based on this experience, we have concluded that it is most important that the drafters of an ADR process clearly give authority to someone — a special master, the hearing examiners, one hearing examiner, the staff director of the project — to decide outstanding general procedural issues. In determining who should have this

authority, the parties should consider the need for both a reasoned and expeditious resolution of these issues.

Equally important is the process which will be used to make decisions regarding outstanding procedural issues. In *Aburime*, we learned as we went along. We now believe it would be possible to plan for a “pilot phase” in the implementation of an ADR process. During this phase, the parties would learn how many claimants will be involved, what the geographic locations will be, what types of documentation typically exist for these types of claims, etc. Once the parties have this context, it would be perfectly appropriate to revisit and make decisions regarding the outstanding procedural issues.

In addition, the parties should agree beforehand whether they will be involved in trying to negotiate outstanding procedural issues, or whether such issues will be submitted immediately to a decision-maker. In *Aburime*, we tended to use a negotiation-mediation-arbitration approach. The attorneys first conferred to try to reach an agreement on the procedural issues. If this did not work, they engaged in a facilitated negotiation — with the staff director serving as mediator. If this did not produce agreements on all of the issues to be resolved, the attorneys submitted their recommendations to the hearing examiners. The hearing examiners then made and disseminated their decisions.

INTERPRETING SUBSTANTIVE PROVISIONS

In the implementation of any complex settlement agreement, it is likely that issues will arise that require interpretation of substantive provisions. For example, in *Aburime*, it was not clear whether a claimant who had submitted a “letter of interest” regarding a position had actually “applied” for a particular position. If a letter of interest constituted an application, the claimant could make a promotion claim under the Consent Decree. Otherwise, no claim existed.

The Consent Decree in *Aburime* did not specify who had the authority to interpret this and other substantive provisions. Under these circumstances, this issue and several others ultimately were submitted to Judge Alsop for a decision. However, during the course of implementing the Consent Decree, Judge Alsop empowered the hearing examiners to conduct the first review of these types of issues and advise the court regarding their views on appropriate resolution. We believe that this approach has substantial merit. Most importantly, however, the parties should reach agreement *beforehand* regarding who will have the authority to interpret the substantive portions of an agreement and the procedure to be used for their submissions to the decision-maker.

ADVANTAGES OF A TWO-PHASE PROCESS

The Consent Decree in *Aburime* provided that every claim would go through the same expedited arbitration process. In fact, as the process evolved and as it became clearer to the attorneys which claims were strong, which were more questionable, and how the hearing examiners were valuing the claims, a two-phase resolution process developed. The lead attorneys began to meet regularly and discuss settlement of individual claims, as well as categories of claims. As a result, many claims were resolved in a first, very informal settlement phase. The claims which were not resolved in this phase

PROCEDURAL ISSUES

SOME PROCEDURAL ISSUES that need to be addressed in applying ADR to a mass tort or monster case can include, but are not limited to:

- Procedure for determining eligibility to participate in the ADR process
- Limits on discovery
- Documentation that will be exchanged automatically in every case
- Procedure for deciding discovery disputes expeditiously
- Procedure for job elections, if this is a remedy provided in the Consent Decree
- Time limits on all types of hearings
- Requirements and limits regarding pre- and post-hearing briefs
- Time limits and page limits for orders
- Amount of reasoning to be included in orders
- Precedential value of other hearing examiners' decisions
- Grounds for appeal (if any) from decisions
- Required communication between the lead attorneys regarding the status of the project and outstanding procedural issues
- Required, periodic meetings of the hearing examiners to discuss status of the project
- Procedure for resolving disputes over enforcement of settlement agreements or orders

“a judge should not view an ADR disposition of a monster case as a clean lateral pass; time spent on the case by the judge is greatly reduced but not eliminated.”

proceeded to the more demanding arbitration process.⁴ A two-phase resolution process serves the goals of efficiency and fairness. Every claimant has the option to proceed through the ADR process. However, it is likely that only the claims which are more substantial and/or more difficult to settle will require the more expensive, intensive ADR step.

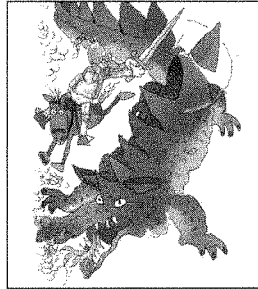
CREATING AN ADR PROCESS

Importantly, we learned that as attorneys tackle the task of drafting the ADR provisions in a Consent Decree, it is advisable to consult with the organization that will be administering the ADR process, particularly if the organization has experience in this area. There is no need to recreate the wheel. Indeed, attorneys may do their clients a disservice if they refuse to learn from the experience of others.

From a judicial perspective, the use of ADR as an aid to resolution of monster litigation offers the benefits of creativity, responsiveness, and flexibility. ADR use also offers economies of judicial resources. On a cautionary note, however, a judge should not view an ADR disposition of a monster case as a clean lateral pass; time spent on the case by the judge is greatly reduced but not eliminated. While the case can be stricken from the trial calendar, judicial effort is still required at the front end of the case to insure that the attorneys establish an appropriate and comprehensive ADR process.

CONCLUSION

ADR holds great promise for helping to resolve monster litigation that involves a large number of very different and fact-specific individual claims. However, attorneys and judges need to use this tool thoughtfully. It is essential that attorneys and judges plan for the procedural and substantive challenges that inevitably will be presented. In *Aburime*, we learned that the ADR process should be carefully delineated before the Consent Decree is signed. We also learned that prior coordination with the proposed ADR provider can be very helpful. We hope that these lessons, and the others detailed here, can be applied by attorneys, judges, and clients as they explore creative means to resolve future monster cases. □



NOTES

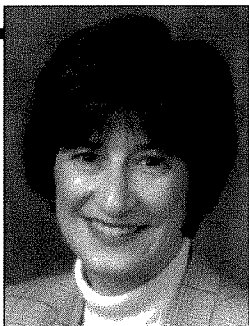
1 This is based on responses to a questionnaire which was sent to 1,000 attorneys in Minnesota. A pseudo-random sample was drawn, stratified by judicial district, of attorneys named in 1996 court cases. The response rate was 74.8%. The questionnaire was developed by Prof. Barbara McAdoo of Hamline University School of Law, Karen Cody-Hopkins and Heidi Green from the Supreme Court Office of Research and Evaluation, with help from ADR Review Board members Lynae Olson, Dan Gislason, and Nancy Welsh and staff to the ADR Review Board, Alanna Moravetz.

2 Other examples of the use of ADR to help settle “monster” cases include: the ADR process established by the Dalkon Shield Claimants Trust to settle or hear individuals’ claims; the ADR process which was part of the settlement approved in 1996 in *Willson v. New York Life Insurance Company*, Index 94/127804 (Sup. Ct. N.Y. Co.); and the ADR component of a remedial plan that Prudential Insurance Company of America has agreed to adopt. See Report of the Multi-state Life Insurance Task Force and Multi-state Market Conduct Examination of The Prudential Insurance Company of American, adopted July 9, 1996, at pages 188-207.

3 In administering this project, Mediation Center performed many of the functions normally associated with court administration, such as assigning cases to the hearing examiners; scheduling all hearings; facilitating negotiations between the lead attorneys regarding general procedural issues, to help them attempt to reach agreements; coordinating the activities, discussion, and decision-making of the hearing examiners regarding general procedural and substantive issues; coordinating the submissions of the parties to the hearing examiners regarding general procedural issues; disseminating the general procedural decisions of the hearing examiners; providing the space for the hearings; and maintaining the written and audio records. Mediation Center also advised the court regarding the progress of the project and specific substantive and procedural issues and paid the hearing examiners for their services.

4 The hearing examiners were: Joe Dixon, William Mavity, Prof. Barbara McAdoo, Prof. Marilynne Roberts, Thomas Spence, and Marcy Wallace.

5 Interestingly, in the class actions listed in footnote 2, the parties have explicitly established a two-phase resolution process.



Nancy Welsh, executive director of Mediation Center, mediates, facilitates, and arbitrates contract, employment and public policy matters. She is a member of Minnesota’s ADR Review Board.



Hon. Ann Montgomery, U.S. district judge for the District of Minnesota, is a former federal magistrate judge and Hennepin County district court judge. She is a graduate of the U of M law school.